STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Harold Hood, PJ, and E. Thomas Fitzgerald and Donald E. Holbrook Jr., JJ
Reversing the Circuit Court for the County of Kent, H. David Soet, J.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

vs

JERRY CLAY,

Defendant-Appellee.

_____/

Supreme Court
No. 120024

Court of Appeals
No. 211768

Kent County Circuit
Court No. 94-00945-FH

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

This matter is before the Court pursuant to the Court's order of April 30, 2002, granting the People's application for leave to appeal. (38a)

STATEMENT OF QUESTIONS PRESENTED

-I-

WAS THE DEFENDANT'S INCARCERATION LAWFUL, REGARDLESS OF ANY SUBSEQUENT RULING THAT THE STOP AND SEARCH OF THE DEFENDANT WERE IMPROPER, BECAUSE (1) THE DEFENDANT HAD IN FACT COMMITTED THE CRIME OF CARRYING A CONCEALED WEAPON, AND (2) THERE WAS AN OUTSTANDING BENCH WARRANT FOR HIS ARREST WHEN HE WAS STOPPED; AND DID THE COURT OF APPEALS ERR IN FINDING THAT THE DEFENDANT WAS NOT LAWFULLY INCARCERATED AND IN REVERSING HIS CONVICTION OF ASSAULTING A CORRECTIONS OFFICER?

The Trial Court answered, "Yes."

The Court of Appeals answered, "No."

Defendant-Appellee answers, "No."

Plaintiff-Appellant answers, "Yes."

-II-

WHERE THE DEFENDANT NEVER ARGUED AT TRIAL OR IN HIS DIRECT APPEAL OF RIGHT THAT HIS ALLEGEDLY UNLAWFUL ARREST REMOVED HIM FROM THE STATUTORY PROVISION COVERING ASSAULT OF A CORRECTIONS OFFICER, WAS THE DEFENDANT NOT ENTITLED TO HAVE HIS CONVICTION SET ASIDE WHERE HE RAISED THIS ISSUE FOR THE FIRST TIME IN A POST-APPEAL MOTION FOR RELIEF FROM JUDGMENT?

The Trial Court did not address this question as stated.

The Court of Appeals answered, "No."

Defendant-Appellee answers, "No."

Plaintiff-Appellant answers, "Yes."

STATEMENT OF FACTS

The defendant was charged in this case with assault of an employee of a place of confinement, contrary to MCL 750.197(c). The specific allegation was that the defendant assaulted Deputy Randy Heuvelman, a corrections officer at the Kent County Correctional Facility. This assault occurred after the defendant was arrested for carrying a concealed weapon, MCL 750.227. The defendant was separately tried for carrying a concealed weapon and assault of an employee of a place of confinement, and was convicted of both offenses.[1]

The defendant appealed by right, in separate appeals, from both convictions. The Court of Appeals affirmed the defendant's conviction for assaulting a corrections officer in a place of corrections. See People v Clay, Docket No. 183102, unpublished per curiam opinion dated January 21, 1997. (12a-13a) In that appeal, the defendant had raised three issues: whether the trial court failed to ensure that he effectively waived his right to counsel; whether the prosecutor engaged in prejudicial misconduct in questioning witnesses and arguing his case; and the sufficiency of proofs of a prior conviction. The defendant never claimed, either in the trial court prior to conviction or in his initial appeal on this case, that his incarceration was unlawful and that he therefore could not be convicted of assaulting an employee of a place of confinement.

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[1] The facts are not in issue. The defendant does not, for purposes of this appeal, contest that he assaulted Deputy Heuvelman; at least he does not contest that there was ample evidence he committed the assault. The People do not allege that the assault was other than a simple assault. If the defendant's argument is correct, he is guilty of only assault and battery, MCL 750.81, a 90-day offense at the time of the crime, and not assault of an employee of a place of confinement, a 4-year felony.

Also not in issue is whether the search which led to the discovery of the gun on the defendant's person was proper. The People argued that the search was valid, but the Court of Appeals held the search to be improper, and this Court denied our leave to appeal in that case. (17a) The law of the case is that the search was improper, and that issue cannot at this juncture be relitigated.

After the affirmance on the assault conviction, a separate panel of the Court of Appeals reversed the defendant's conviction of carrying a concealed weapon. See People v Clay, Docket No., 183101, unpublished per curiam opinion dated April 11, 1997. (14a-16a) The basis of the reversal of the weapons charge was that the stop of the defendant by Grand Rapids Police Officers was supported by neither probable cause nor reasonable suspicion, that the asserted reason for the stop, that the defendant was impeding traffic, was not a justification for the stop, and that there was no justification for arresting the defendant for aiding and abetting a traffic violation. (15a) The Court also held that the arrest could not be justified on the grounds that the defendant had been trespassing on private property. (15a) The Court held that the subsequent search of the defendant, which revealed the gun, violated his Fourth Amendment right against unreasonable searches and seizures. The Court remanded the case "for further proceedings, dismissal or retrial, at the prosecutor's option, consistent with this opinion." (16a) This Court denied the People's application for leave to appeal the reversal of the conviction of carrying a concealed weapon. (17a)

The defendant's conviction of assaulting a corrections officer had, as noted, already been affirmed. The defendant filed in the trial court a motion for relief from judgement, MCR 6.500 et seq, alleging that since it had been judicially determined that his arrest for carrying a concealed weapon was improper, his incarceration at the jail when he assaulted the corrections officer could not constitute the crime of assaulting a corrections officer in a place of employment. The defendant theorized that that crime applies only where the incarceration is "lawful," and that his incarceration had been declared unlawful. The trial court denied the motion. (18a-24a) The trial court noted that, at the time the defendant was arrested and charged with carrying a concealed

weapon, there was an outstanding bench warrant for his arrest. It appears, however, that this fact was not known to the arresting officers or to jail personnel until after the assault occurred. (23a)

The Court of Appeals granted the defendant's leave to appeal. In a published opinion, People v Clay, 239 Mich App 365; 608 NW2d 76 (2000), the Court affirmed the defendant's conviction, finding that the statute in question did not require "lawful" incarceration. (25a-33a)

The defendant applied for leave to appeal to this Court, which was granted. People v Clay, Docket No. 116280, 463 Mich 906 (2000). (34a) In our brief in this Court, the People agreed with the defendant's position, and disagreed with the Court of Appeals, that the statute required "lawful" incarceration, but argued that the defendant's incarceration was lawful in fact. This Court accepted the defendant's position, and the People's concession, that the statute required lawful incarceration, and remanded the matter to the Court of Appeals for a determination on whether the defendant's incarceration was lawful at the time of the assault. People v Clay, 463 Mich 971 (2001). (35a)

On remand after briefing, the Court of Appeals held in a published opinion that the defendant's incarceration was not lawful, and reversed the defendant's conviction. (36a-37a) The Court rejected the People's argument that the defendant was lawfully in custody, stating that "a search, in law, is good or bad at the time of commencement, and its character does not change based on its success." (36a). See People v Clay (on remand), 247 Mich App 322; 636 NW2d 303 (2001).

ARGUMENT I

THE DEFENDANT'S INCARCERATION WAS LAWFUL, REGARDLESS OF ANY SUBSEQUENT RULING THAT THE STOP AND SEARCH OF THE DEFENDANT WERE IMPROPER, BECAUSE (1) THE DEFENDANT HAD IN FACT COMMITTED THE CRIME OF CARRYING A CONCEALED WEAPON, AND (2) THERE WAS AN OUTSTANDING BENCH WARRANT FOR HIS ARREST WHEN HE WAS STOPPED. THE COURT OF APPEALS ERRED IN FINDING THAT THE DEFENDANT WAS NOT LAWFULLY INCARCERATED AND IN REVERSING HIS CONVICTION OF ASSAULTING A CORRECTIONS OFFICER.

The issue in this case is whether the defendant's incarceration at the time he assaulted Deputy Heuvelman was lawful. The facts, for purposes of this issue, are not in dispute. The issue presented is strictly one of law, and is reviewed de novo. McAuley v General Motors Corp, 457 Mich 513, 518; 578 NW2d 282 (1998); People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999).

The Court of Appeals had originally affirmed the trial court's denial of the defendant's motion for relief from judgment. The majority reasoned that the statute in question, assault of a corrections officer, did not require that the incarceration be "lawful" for a defendant awaiting examination, trial, arraignment, or sentence. This Court granted leave to appeal. In our brief in this Court, the People disagreed with the Court of Appeals's reasoning, but submitted that the Court of Appeals nonetheless reached the right result for the wrong reason. We argued that the defendant's incarceration in the jail at the time he committed the assault was "lawful" as that term is used in the statute. This Court remanded for the Court of Appeals to address this question.

After the defendant was arrested and lodged in the Kent County Correctional Facility, he struck Deputy Randy Heuvelman, a corrections officer. The defendant does not contend that he

was justified in striking Deputy Heuvelman.[2] In setting aside the defendant's separate conviction of carrying a concealed weapon, a separate panel of the Court of Appeals declared that the initial stop of the defendant was improper. In any effort to prosecute the defendant for carrying a concealed weapon, the exclusionary rule would prevent the introduction into evidence of the gun the defendant was carrying when he was arrested. The Court of Appeals conclusion in its opinion following remand was that this is tantamount to a finding that the defendant's incarceration in jail at the time he assaulted Deputy Heuvelman was unlawful. The People respectfully submit that the Court of Appeals was wrong.

The defendant was convicted of assault of a corrections officer. That statute, MCL 750.197(c),[3] states:

> A person lawfully imprisoned in a jail, other place of confinement established by law for any term, or lawfully imprisoned for any purpose at any other place, including but not limited to hospitals and other health care facilities or awaiting examination, trial, arraignment, sentence, or after sentence awaiting or during transfer to or from a prison, for a crime or offense, or charged with a crime or offense who, without being discharged from the place of confinement, or other lawful imprisonment by due process of law, through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement or other custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony.

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2 While it is in context a minor point, the proper remedy, even if the Court of Appeals decision were analytically correct, would be to remand with orders to reduce the defendant's conviction to simple assault.

3 The statute was amended in 1998, 1998 PA 510, to include a youth correctional facility in the term "place of confinement," and to clarify that an "employee" would include those employed by the place of confinement as independent contractors. Those additions do not affect the central issue in this case.

The goal of statutory construction is to discern and give effect to the Legislature's intent. McJunkin v Cellasto Plastic Corp, 461 Mich 590, 598; 608 NW2d 57 (2000). When the plain language of the statute is unambiguous, it is presumed that the Legislature intended the meaning clearly expressed; no further judicial construction is required or permitted, and the statute must be enforced as written. Tryc v Michigan Veterans' Facility, 451 Mich 129, 135; 545 NW2d 642 (1996). Words must be given their plain and ordinary meaning. Only where the statutory language is ambiguous may the Court look outside the statute to ascertain the Legislature's intent. People v Morey, 461 Mich 325, 330; 603 NW2d 250 (1999).

In this case, the issue is not whether the statute requires that the defendant be "lawfully imprisoned." We believe that it does, and so conceded when this case was first before this Court. This Court in its February 26, 2001 order (35a) concluded Judge Holbrook's dissent correctly construed the statute, and that lawful imprisonment is indeed required by the statute. But that still begs the question: what does "lawful imprisonment" mean? That critical issue was summarily addressed by the Court of Appeals, with the completely unhelpful observation that a search is good or bad at the time of the search. But if the search was bad, it does not follow that the defendant's imprisonment was "unlawful." MCL 750.197(c) applies to a person "lawfully imprisoned," but does not require that the person be "arrested only pursuant to a search later held to be valid."

MCL 750.197(c) does not purport to restrict its application to only those whose imprisonment is later found to be beyond reproach. The statute talks of those lawfully imprisoned "without being discharged from the place of confinement, or other lawful imprisonment by due process of law." This language suggests that the Legislature intended the

statute to reach those who unilaterally seek their own discharge from jail, or choose to engage in assaultive behavior before being duly discharged from jail.

In People v Neal, 233 Mich App 649; 592 NW2d 95 (1999), the Court of Appeals, resolving a conflict in panels, adopted the reasoning and analysis set forth in its earlier opinion in the case, People v Neal, 232 Mich App 801; 592 NW2d 92 (1998). The defendant in Neal, an inmate in prison, had been convicted of assaulting an employee of a place of confinement. The Court originally, bound by a prior decision in People v Gaines, 223 Mich App 230; 566 NW2d 35 (1997), held that the conviction had to be reversed because the prosecution had failed to prove that the defendant's conviction was "lawful." But the Court also said that the failure to introduce positive evidence that the defendant's conviction was "lawful" should not be controlling, that sufficient evidence was presented that would permit a rational trier of fact to find that the defendant was lawfully imprisoned. The Court did note, 232 Mich App at 804, that Michigan and courts of other jurisdictions had historically construed statutes requiring "lawful imprisonment" to require lawfulness as an element of the prosecution's prima facie case. The issue in Neal was the quantum of proof necessary to meet this element, not whether lawfulness was an element. But neither Neal opinion addressed the meaning of the term "lawful," since that specific issue was not before the Court.

The issue has most often been addressed in the context of escape cases. Traditionally, the escape of a prisoner who is unlawfully confined is not a crime, because there "can be no escape, in the sense of the law, unless there was lawful custody." Perkins & Boyce, Criminal Law (3d Ed), Ch. 5, § 3, p 561, quoting People v Ah Teung, 92 Cal 421, 425; 28 P 577 (1891). But a person "who has been taken into the custody of the law by arrest or surrender remains in legal custody until he has been delivered by due course of the law or departs unlawfully." Id., p 562.

"An escape is not justified or excused by reason of informality or irregularity in the process of commitment, arrest or information. Imprisonment may be lawful within the meaning of 'legal custody' although the prisoner would be entitled to be released by taking proper steps for this purpose; and if, in such a situation, he takes no such steps but wrongfully frees himself he is guilty of an escape." Id., p 563.

Michigan follows this general rule. In People v Norwood, 123 Mich App 287; 333 NW2d 255 (1983), the defendant was convicted of assaulting a corrections officer. The defendant had been arrested for assault with intent to commit murder, a charge which was later dismissed. The Court of Appeals reversed the defendant's conviction on unrelated grounds, but rejected the argument that, because the charges were later dismissed, the defendant was therefor not "lawfully imprisoned" when he committed the assaults. The Court found it "immaterial that the charge of assault with intent to murder was later dismissed. Evidence of a lawful arrest suffices to establish the required element of lawful imprisonment under the statute." Id., p 295. Norwood is not dispositive of the issue in this case, however. Norwood does not say that an arrest must be "lawful" for the defendant's assaultive conduct to come under the statute; nor does it define just what a "lawful" arrest would be.

The defendant's argument, which was essentially adopted by the Court of Appeals, is simple, and almost elegant in its Euclidian reasoning: "I was unlawfully stopped, therefore was not lawfully arrested, therefore was not lawfully incarcerated, therefore cannot be guilty of assaulting a corrections officer." Quod Erat Demonstrandum. But the law is not a matter of mathematical precision. As noted, the general rule is that an irregularity in the process does not grant to a defendant a self-help remedy. And the defendant's logical syllogism collapses because of an error in his initial premise. He was not unlawfully arrested.

The defendant's arrest was, objectively, lawful on two bases.

First, the defendant's arrest was valid because he in fact was carrying a concealed weapon.

The Court of Appeals in Docket No. 183101 reversed the defendant's conviction for carrying a concealed weapon because the discovery of the weapon was the result of an improper arrest for trespassing, and that the search of the defendant subsequent to the arrest was hence improper. (15a) But "the sole remedy for an illegal arrest is suppression of the evidence, not dismissal of the charges." City of Lansing v Hartsuff, 213 Mich App 338, 352; 539 NW2d 781 (1995). A defendant who claims that he was improperly seized by the police, and that evidence was improperly obtained as a result of that improper seizure, may moved to suppress the evidence. But that is an argument that must be raised in a pre-trial motion to suppress. A Fourth Amendment violation is not a jurisdictional defect, and a claim of an improper search may be waived, for example, by a plea of guilty. People v New, 427 Mich 482; 398 NW2d 358 (1986). Evidence is properly usable until such time as a court declares that the evidence was improperly seized and should be excluded. In a very real and practical sense, as well as a legal sense, an arrest based on the finding of evidence is lawful even if the evidence which gives rise to the arrest is improperly seized and eventually held inadmissible.

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nowhere does the Fourth Amendment state a remedy for its violation.

The exclusionary rule is a judicially crafted remedy, designed to enforce constitutional rights, Stone v Powell, 428 US 465, 482; 96 S Ct 3037; 49 L Ed 2d 1067 (1976), but it is not itself mandated by the language of the Fourth Amendment. The United States Supreme Court has held that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v Calandra, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974). "Recognizing not only the benefits but the costs, which are often substantial, of the exclusionary rule, we have said that 'application of the rule has been restricted to those areas where its remedial objective are thought most efficaciously served,'" United States v Ceccolini, 435 US 268, 275; 98 S Ct 1054; 55 L Ed 2d 268 (1978), citing Calandra, supra.

The Michigan protection against unreasonable searches and seizures, Const. 1963, art 1, § 11, states, in clear and unambiguous terms, that it "shall not be construed to bar from evidence in any criminal proceeding any . . . firearm . . . seized by a peace officer outside the curtilage of any dwelling house in this state." While the federal exclusionary rule is binding on the states, and trumps the anti-exclusionary rule of our state's constitution, it remains only a remedy to apply to an allegedly illegal seizure of evidence; it is not a statement that an arrest of a suspect for carrying a concealed weapon is improper because the weapon was discovered through an improper search.

In determining whether exclusion of evidence is the proper remedy, a court must "evaluate the circumstances of [the] case in the light of the policy served by the exclusionary rule." Brown v Illinois, 422 US 590, 604; 95 S Ct 2254; 45 L Ed 2d 416 (1975). "The rule is calculated to prevent, not repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it. . . .

[D]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." Id., 422 US at 599-600. See People v Stevens, 460 Mich 626, 635-636; 597 NW2d 53 (1999).

The United States Supreme Court has held that a voluntary statement taken from a defendant at a police station, when the arrest occurred during an unlawful entry into the defendant's residence, would nonetheless be admissible. New York v Harris, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990). "As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that 'anything which deters illegal searches is thereby commanded by the Fourth Amendment.'" Id., 495 US 20, quoting United States v Leon, 468 US 897, 910; 104 S Ct 3405; 82 L Ed 2d 677 (1984). The Court of Appeals, following the Harris rule, has noted that exclusion of physical evidence "would certainly deter police from conducting illegal searches," and that extension of the exclusionary rule to preclude an otherwise voluntary statement, taken at a police station after the arrest, would not undermine the deterrent effect of the rule. People v Dowdy, 211 Mich App 562, 569; 536 NW2d 794 (1995).

The United States Supreme Court has also held that an irregularity in the manner in which a defendant is brought before a court does not divest the court of jurisdiction to try the case, or make all proceedings in the trial court unlawful. In United States v Alvarez-Machain, 504 US 655; 112 S Ct 2188; 119 L Ed 2d 441 (1992), the defendant was forcibly kidnapped from his home in Mexico and flown to Texas, where he was arrested for his alleged participation in the murder of a Drug Enforcement Administration agent. The Court held that the kidnapping of the defendant, the forceful bringing him into the jurisdiction of United States courts rather than reliance on an extradition treaty, did not affect the propriety of later proceedings against him. In

Frisbie v Collins, 342 US 519; 72 S Ct 509; 96 L Ed 1344 (1952), the Court held that a kidnapping of a defendant from Chicago by Michigan officers in violation of the Federal Kidnapping Act did not make the defendant's subsequent trial in Michigan illegal.

This Court has adopted the same principle. In People v Burrill, 391 Mich 124; 214 NW2d 823 (1974), this Court held that an invalid arrest warrant, authorized by a court but improperly issued, did not deprive the circuit court of jurisdiction to try the case. "The sole sanction imposed by the United States Supreme Court for the invalidity of an arrest warrant has been the suppression of evidence obtained from the person following his illegal arrest.". Id., 391 Mich at 133. By analogy, the proper remedy for an arrest based on an unlawful seizure of evidence should be only the suppression of the evidence, not a declaration that the incarceration of the defendant for his clear violation of the law is for all purposes unlawful.

The point is not whether the seizure of the defendant's gun, which formed the basis for his arrest on the charge of carrying a concealed weapon, was proper; that issue has been litigated, and is not before this Court. The point is that the defendant had committed a crime – carrying a concealed weapon – and that he was lawfully at the Kent County Correctional Facility for that crime, even if the seizure of the weapon was later held to be improper. The exclusionary rule serves to deter police misconduct. Extending the rule, and declaring that an arrest for a crime which the defendant beyond cavil had committed based on evidence later held to have been improperly seized gives the defendant the right to assault a corrections officer and face only a 90-day misdemeanor for his crime, MCL 750.81, bears no rational relation to the purposes the rule is supposed to serve.

It may make sense as a matter of statutory construction that when a defendant is placed in jail solely on a basis that is undeniably unjustified – for example, based on a police officer's

fabrication of events – his resultant incarceration should be deemed unlawful ab initio. But where an arrest appears proper in form, is for a proper charge, and objectively there is evidence to support the charge, the defendant's imprisonment itself should be considered lawful. The defendant has the right to challenge the admission of evidence which he alleged was obtained in violation of his rights under the Fourth Amendment, of course, through a pretrial motion to suppress. But the defendant ought not have the right to use physical force to protest his arrest for a crime which he really committed. And to assault a jail guard who is doing no more than performing his duty of maintaining order in a correctional facility.

The problem with the Court of Appeals opinion can be considered through a simple hypothetical. Suppose the defendant had not assaulted Deputy Heuvelman. Suppose that he was convicted only of carrying a concealed weapon. Suppose he had received a prison term for that offense. Suppose that, during the pendency of his appeal, the defendant assaulted a guard in a state correctional facility. Suppose that the defendant's conviction of carrying a concealed weapon had been reversed on appeal, based on a finding of an illegal stop and illegal discovery of the weapon. According to the Court of Appeals theory, the assault of the prison guard would only be a misdemeanor, because that conviction was, after the assault, determined to be "unlawful," even though the defendant was properly incarcerated. It makes no sense to interpret "lawfully" imprisoned so narrowly as to preclude conviction for assaulting a corrections officer, either in the posited hypothetical or on the facts of this case.

A defendant in Michigan has a right to resist an unlawful arrest. People v Krum, 374 Mich 356, 361; 132 NW2d 69 (1965). As a matter of policy, this is a terrible rule; most jurisdictions have found this rule to be outmoded, and have abandoned it. People v Wess, 235 Mich App 241, 245; 597 NW2d 215 (1999). "Given its waning support in other jurisdictions,

and in light of the considerable protections intended to guarantee the expeditious processing and humane treatment for those arrested," the Court of Appeals has recently declined to "[escalate] the potential harms already inherent in an arrest situation by extending to third-party intervenors the precarious right to use force against government officials." Id., 235 Mich App at 245-246. The right to resist an unlawful arrest is not involved in this case. But since what is involved is the judicially created rule that would preclude evidence seized in violation of the Fourth Amendment, the policy considerations mentioned in Wess are applicable to the instant case. There is little sense in considering the defendant's presence at the Kent County Correctional Facility as unlawful when the Constitution does not mandate such a result, and where the deterrent effect of the exclusionary rule is served by precluding from evidence the fruits of an unlawful search. That the exclusionary rule makes prosecution for the charge of carrying a concealed weapon impossible does not mean that the arrest for carrying a concealed weapon was itself invalid. And it does not make unlawful the defendant's incarceration in jail after his arrest.

There is a second, independent justification for the arrest. The defendant in fact had outstanding warrants for his arrest. His arrest was thus lawful on that basis.

The test for whether a police officer's actions are proper is objective, not subjective, i.e., whether there is a basis which justifies the officer's actions, not whether the officer articulated the proper basis. People v Arterberry, 431 Mich 381; 429 NW2d 574 (1988). In Arterberry, officers executing a search warrant searched the defendant, who was present at the scene of a search warrant of a drug house. The officers apparently thought that the search warrant justified a search of the defendant's person, though the defendant was not named personally in the search warrant. The trial court granted the defendant's motion to suppress. This Court reversed, finding that the search of the defendant, as well as that of the other occupants of the premises at the time

of the search, was objectively proper, since the defendant was subject to being searched incident to a lawful arrest. Notably, the officers did not assert, and perhaps did not even have in mind, this justification for the search when they searched the defendant. But the validity of the search was "not negated by the failure of the officers to arrest the occupants. Where officers have probable cause to arrest a group of persons and, instead of arresting them all, search them and then arrest only some of the group, they act properly." Id., 431 Mich at 384. "There is no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'" Peters v New York, 392 US 40, 77; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (Harlan, J., concurring), quoted in Arterberry, supra, 341 Mich at 384, 385.

The defendant has argued that there were no grounds for the stop, that the stop was therefore improper, and that everything which flows thereafter, including his incarceration in jail, was improper. But objectively, that is not true. The stop, objectively, was proper. There were bench warrants outstanding for the defendant's arrest. Objectively, the defendant could have been stopped and arrested based on the bench warrants.

There is one obvious difference between Arterberry and the instant case. In Arterberry, the facts on which the officers could have made an arrest were fully known: the defendant and others were seen loitering in a place of an illegal business, which justified their arrest for disorderly conduct. The officers in Arterberry did not articulate the legal significance of the facts known to them, but the facts were known. In the case at bar, no one knew of the bench warrants until after the defendant was arrested and taken to jail and he had assaulted Deputy Heuvelman. But objectively, the facts justifying the arrest did exist. That a police officer "does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the

officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Scott v United States, 436 US 128, 138; 98 S Ct 1717; 56 L Ed 2d 1658 (1978). While Scott does comment on an officer's actions "in light of the facts and circumstances then known to him," Id., 436 US at 137, we are unaware of authority which has restricted the objective test for an arrest only to the precise facts known to the police officer. The irreducible fact remains that bench warrants had been issued for the defendant's arrest, which warrants justified taking him into custody, and which made his custody, objectively, proper.

The People submit that the Court of Appeals opinion is analytically unsound, and that the incarceration of the defendant when he assaulted Deputy Heuvelman was proper. The People ask that this Court reverse the Court of Appeals and reinstate the defendant's conviction.

ARGUMENT II

THE DEFENDANT NEVER ARGUED AT TRIAL OR IN HIS DIRECT APPEAL OF RIGHT THAT HIS ALLEGEDLY UNLAWFUL ARREST REMOVED HIM FROM THE STATUTORY PROVISION COVERING ASSAULT OF A CORRECTIONS OFFICER. THE DEFENDANT WAS NOT ENTITLED TO HAVE HIS CONVICTION SET ASIDE WHERE HE RAISED THIS ISSUE FOR THE FIRST TIME IN A POST-APPEAL MOTION FOR RELIEF FROM JUDGMENT.

As noted in the Statement of Facts, the defendant in his direct appeal of this conviction raised three issues, but never raised a claim that he was not "lawfully" imprisoned. That claim was made for the first time in the defendant's motion for relief from judgment. If the Court accepts our argument on the meaning of the term "lawfully" imprisoned, then the issue we raise in this second argument can be ignored. But the People do submit, as an alternative basis for reversing the Court of Appeals, that the issue the defendant raises is not one which should be cognizable when raised for the first time in a motion for relief from judgment years after conviction.[4]

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[4] During the first appeal of this case to this Court, we raised this same argument in our brief, conceding that we had not presented this argument to the Court of Appeals. We also filed in this Court a motion to add issues pursuant to MCR 7.302(F)(4)(b). The Court's order of February 26, 2001 denied that motion. (35a) We raised this argument in our brief on remand before the Court of Appeals. The Court of Appeals said that the argument was "outside the scope of the Supreme Court's remand," but also said, without analysis, that the argument was "without merit." (37a) We anticipate that the defendant will argue that Argument II in this brief is not now properly before the Court. We believe this argument is proper to make at this point, however, and is intertwined with our first issue. We have argued that seizure of evidence is lawful until and unless declared unlawful in a properly brought motion. That the motion was not made until after direct appeal, brought for the first time in a motion for relief from judgment, is a relevant question to whether a defendant's arrest should be declared, as a matter of law, unlawful.

MCR 6.508(D)(3) precludes relief in a motion for relief from judgment if the motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter," unless the defendant demonstrates both good cause for failure to raise such grounds on appeal or in a prior motion, and actual prejudice from the alleged irregularities. "Actual prejudice" means, in a review from a conviction after trial, that the defendant would have had a reasonably likely chance of acquittal at trial but for the error; in a review from a plea based conviction, that the defect renders the plea involuntary to a degree that it would be manifestly unjust to allow the conviction to stand; in either case, that the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand; or in a challenge to a sentence, that the sentence is invalid. MCR 6.508(D)(3)(b). Failure to show cause and prejudice in a motion under MCR 6.500 et. seq. will operate, as it does in federal habeas corpus petitions, Wainwright v Sykes, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977); Engle v Isaac, 456 US 107; 102 S Ct 1558; 71 L Ed 2d 783 (1982), as a waiver of the issues. For example, it is error to grant relief based on a claim that a plea bargain was illusory, even if error appears in the plea proceeding, absent a showing of good cause for failure to raise the claim in a prior appeal. People v Watroba, 193 Mich App 124; 483 NW2d 441 (1992). And it is error to grant relief based on a claim of erroneous jury instructions on the requisite intent required for assault with intent to murder, even where the instructions clearly were erroneous, absent a showing of prejudice as it is defined in the rules governing post-conviction relief. People v Brown, 196 Mich App 153; 492 NW2d 770 (1992).

The defendant might argue that he could not have raised the claim that his incarceration was unlawful until such time as the Court of Appeals set aside his conviction of carrying a

concealed weapon. But the defendant could indeed have raised this issue in his direct appeal. He certainly could have raised it in the trial court. His appeal from the carrying a concealed weapons conviction and his appeal from the charge of assault of a corrections officer could have been consolidated for appeal. He might not have prevailed in the trial court – it is almost certain he would not have prevailed in the trial court – but he could have preserved the issue for eventual review in the Court of Appeals, and could have preserved the issue in the Court of Appeals for review by this Court in an application for leave from his appeal of right, rather that in a collateral proceeding.

The defendant might argue ineffective assistance of appellate counsel in an effort to get around the cause and prejudice standards.[5] But in People v Reed, 449 Mich 375; 535 NW2d 496 (1995), this Court specifically addressed a claim of ineffective assistance of appellate counsel argued in a motion for relief from judgment as a basis for meeting the cause requirement. The Court noted that the United States Supreme Court has held that a defendant has no constitutional right to have appellate counsel raise every arguably meritorious issue on appeal, that appellate counsel must be afforded reasonable professional judgment in selecting those issues most promising for review. Jones v Barnes, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983). The Court further found that the standards for representation of indigent defendants on appeal did not control, that "good cause" is not met simply by showing noncompliance with those standards, and that the trial court in a motion for relief from judgment may consider the failure to raise an issue on direct appeal as a basis to deny the motion, even if the issues raised have merit, unless constitutionally ineffective assistance of counsel is shown. Defense counsel in the defendant's

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[5] The defendant could hardly argue ineffective assistance of trial counsel, since he insisted on representing himself at trial.

direct appeal did raise three issues. That he did not raise an issue which, in retrospect, the defendant argues is meritorious, does not equate with ineffective assistance of appellate counsel.

The "good cause" requirement may be waived if there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D)(3). But there is not the slightest iota of a doubt that the defendant assaulted Deputy Heuvelman. The defendant's argument is not that his assaultive conduct was justified; rather, it is that, though he did assault a corrections officer, and though this assault occurred while the defendant was inside the Kent County Correctional Facility, he is not guilty of the felony violation of MCL 750.197(c) because he was technically not "lawfully" incarcerated. Granted that the strictures of motions for relief from judgment ought not preclude relief from the truly innocent, the rules governing collateral attack should not be relaxed to permit a manifestly guilty defendant to raise a technical attack on his conviction which he never raised at trial or in his direct appeal.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the August 31, 2001 opinion of the Court of Appeals, reversing the defendant's conviction of assault of an employee of a place of confinement, be REVERSED, and that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be REINSTATED and AFFIRMED.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: June 24, 2002

By: _____
Timothy K. McMorrow (P 25386)
Chief Appellate Attorney